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In The

SUPREME COURT of the UNITED STATES

October Term, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GILES,

Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion delivered in the court below is not as yet officially reported, but is appended to the Petition for a Writ of Certiorari. The opinion was delivered on July 1, 1971, Dkt. No. 18490. The opinion of the District Court for the Western District of Wisconsin is reported in 310 F. Supp. 972 and is printed in the appendix to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Whether a non-tenured state university professor who alleges that the refusal to renew his employment for another school year is based upon his exercise of First Amendment rights is entitled to minimal due process, including a statement of reasons and a hearing, before the refusal to renew his employment can be accomplished?

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

REASONS FOR NOT GRANTING THE WRIT

I. THE SEVENTH CIRCUIT DECISION IN THIS CASE IS CONSISTENT WITH DECISIONS OF THIS COURT.

Although this Court has never dealt at length with the question of what procedural protections must be extended to non-tenured state university professors before decisions not to renew their employment can be accomplished,* it is clear that there is no conflict between the Seventh Circuit decision in this case and other decisions of this Court. In fact, the decisions below have both followed *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U. S. 886 (1961), in carefully evaluating the competing public and private interests which must be balanced in order to determine what procedures due process requires. This "balancing test" has recently been summarized as follows:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interests in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said

*The substantive constitutional protections of the First Amendment have been applied to non-tenured teachers. See, *e.g.*, *Keyishan v. Board of Regents*, 385 U. S. 589 (1967); *Connell v. Higgenbotham*, 91 S. Ct. 1772 (1971); and, *Shelton v. Tucker*, 364 U. S. 479 (1960).

> in *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961), 'consideration of what procedural due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action.'" *Goldberg v. Kelly*, 397 U. S. 254, 262-263 (1970).

See also, *Wisconsin v. Constantineau*, 91 S. Ct. 507 (1971) and *Bell v. Burson*, 91 S. Ct. 1586 (1971).

In urging this Court to grant certiorari, petitioners have asserted that the decision of the Seventh Circuit is in conflict with decisions of this Court which have established the existence of a governmental power to "summarily discharge" employees "at any time without the granting of a reason." *Cafeteria Workers*, 367 U. S. at 896, *citing Vitarelli v. Seaton*, 359 U. S. 535, 539 (1959). Such language, however, represents the absolutist position that was rejected in *Cafeteria Workers* when this Court established the "balancing test" to be used in determining what procedural protections must be provided to persons threatened with arbitrary government action. Moreover, such absolute power to summarily discharge employees would be inconsistent with this Court's vigilant protection of constitutional freedoms in the academic community. See, *e.g.*, *Shelton v. Tucker*, 364 U. S. 479, 487 (1960); *Weiman v. Updegraff*, 344 U. S. 183, 195 (1952); *Sweezy v. New Hampshire*, 354 U. S. 234, 250 (1957).

In striking the balance in favor of providing procedural protections to non-tenured teachers faced with nonretention, the Seventh Circuit considered not only the danger to First Amendment right posed by the "summary

dismissal" power claimed by the university employer but also the "substantial adverse effect non-retention is likely to have upon the career interests of an individual professor," (Pet. App. 205)* Unlike *Cafeteria Workers*, "where only 'the opportunity to work at one isolated and specific military installation' was involved," see *Willner v. Committee on Character & Fitness*, 373 U. S. 96, 103, n. 2 (1963), non-retention of university professors may "jeopardize an interest in practicing a profession, or in preserving a professional reputation." (Pet. App. 205) See also *Birnbaum v. Trussell*, 371 F. 2d 672 (2nd Cir., 1966) and *Meredith v. Allen County War Memorial Hospital Comm.*, 397 F. 2d 33 (6th Cir. 1968). Consideration of these interests of a public employee is consistent with this Court's requirement that notice and an opportunity to be heard be provided

> ". . . where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him. . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." *Wisconsin v. Canstantineau*, 91 S. Ct. 507, 510 (1971).

This Court has also emphasized the importance of providing public employees, especially teachers, with procedural protections so that a "proper inquiry" can be made into a proposed termination of employment. In *Slochower v. Board of Higher Education*, 350 U. S. 551 (1956), the summary dismissal of a university professor for having exercised his constitutional rights before a congressional com-

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*The page references are to the Seventh Circuit Decision which has been reproduced in the Appendix to the Petition for Certiorari.

mittee was reversed. In concluding that the "summary dismissal . . . violated due process of law," this Court stated:

> "This is not to say that Slochower had a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here.' 350 U. S. at 559.

More recently, in *Connell v. Higgenbotham*, 91 S. Ct. 1772 (1971), this Court reaffirmed the procedural due process holding of *Slochower* by striking down the portion of a Florida loyalty oath which provided for the summary dismissal of non-signing teachers "without hearing or inquiry required by due process." 91 S. Ct. at 1773. See also *Goldberg v. Kelly*, 397 U. S. 254, 263 (1970), in which this Court cited *Slochower* and stated that: "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to . . . discharge from public employment."

The decision of the Seventh Circuit to require the university employer to provide "minimal due process,' including a statement of reasons and a hearing on the proposed non-retention is consistent with this Court's effort to permit aggrieved teachers to examine their termniation in order to determine whether the state has a "real interest," see *Slochower*, 350 U. S. at 559, in its proposed action. It is difficult to believe that the teachers in *Slochower* and *Connell* would be less entitled, as a matter of constitutional law, to a "proper inquiry" into their terminations had their employers simply waited until the end of the current

academic year and then failed to renew their employment without stating the reason for such action or providing a hearing.

II. THE CONFLICT AMONG THE CIRCUITS RAISED BY THE DECISION OF THE SEVENTH CIRCUIT TO EXTEND PROCEDURAL PROTECTIONS TO NON-TENURED STATE UNIVERSITY PROFESSORS WHO ALLEGE THAT THE REFUSAL TO RENEW THEIR EMPLOYMENT IS BASED UPON THEIR EXERCISE OF CONSTITUTIONALLY PROTECTED FIRST AMENDMENT ACTIVITIES DOES NOT WARRANT THE GRANTING OF CERTIORARI.

Respondent acknowledges the existence of a conflict among the circuits on the broad question of what procedural safeguards, if any, must be extended to non-tenured teachers before a decision not to renew their employment may be accomplished. However, the Seventh Circuit decision in *Roth*, on its facts, does not raise the precise issue on which the circuits have split. Moreover, the conflict that does exist between the other circuits and the Seventh Circuit decision in *Roth* can be attributed to a large extent to the different positions taken on the underlying question of the substantive rights of non-tenured teachers.

The *Roth* case was decided against the background of a First Amendment controversy and, as noted by the Seventh Circuit, respondent's public expressions were considered in support of the non-retention decision. Therefore, in spite of the fact that "the principle announced by the district court applies by its terms to all non-retention decisions," the Seventh Circuit took the First Amendment controversy into consideration and concluded that

". . . an additional reason for sustaining application

> in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." (Pet. App. 206)

This background of First Amendment controversy distinguishes the Seventh Circuit decision in *Roth* from the decision in the First Circuit which has required a statement of reasons but has denied a hearing and from the decision of the Sixth Circuit which has denied both. See, *Drown v. Portsmouth School District*, 435 F. 2d 1182 (1st Cir. 1970), *cert. denied*, 91 S. Ct. 1659 (1971) and *Orr v. Trinter*, Dkt. No. 20721, (6th Cir. June 16, 1971) *reversing* 318 F. Supp. 1041 (S.D. Ohio 1970), *petition for cert. filed*, 40 U. S. L. W. 3081 (U.S. August 18, 1971) (No. 71-249).

Aligned with the Seventh Circuit decision in *Roth* is the Fifth Circuit which has also ruled that a non-tenured teacher who alleges that his termination is in retaliation for his exercise of First Amendment activities is entitled to procedural protections before the non-retention can be accomplished. See *Ferguson v. Thomas*, 430 F. 2d 852 (1970); *Lucas v. Chapman*, 430 F. 2d 945 (1970); *Perry v. Sindermann*, 430 F. 2d 939 (1970), *cert. granted*, 91 S. Ct. 2226 (1971).*

In urging this Court to grant certiorari, petitioners rely

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*Subsequent to the decision in *Roth*, the Seventh Circuit held that procedural safeguards, including a statement of reasons and a hearing are to be extended to all non-tenured teachers, regardless of the existence of a First Amendment controversy. This position is in conflict with not only the Fifth Circuit but also with the First and Sixth. Compare *Schrick v. Thomas*, Dkt. No. 18790, (7th Cir. September 2, 1971), *reversing*, 315 F. Supp. 1124 (S.D. Ill. 1970) with *Thaw v. Board of Public Instruction*, 432 F. 2d 98 (5th Cir. 1970), *Drown v. Portsmouth School District*, *supra*, and *Orr v. Trinter*, *supra*.

on the Tenth Circuit position under which procedural protections are denied to all non-tenured teachers. However, such position is largely the result of the Tenth Circuit's ruling that non-tenured teachers who allege that the failure to renew their employment is based on First Amendment activities fail to state a cause of action under 42 U. S. C. § 1983. See *Jones v. Hopper*, 410 F. 2d 1323 (1969), *cert. denied*, 397 U. S. 991 (1970). Finding that non-tenured teachers have no substantive rights outside of their teaching contracts, a court might conclude that little purpose would be served in providing such teachers with a statement of reasons and a hearing. In any event, it is premature to conclude that a conflict exists between the Seventh and Tenth Circuits on the question of the procedural rights of non-tenured teachers until the even more fundamental conflict between these Circuits on the question of the substantive rights of non-tenured teachers is resolved. Compare *Jones v. Hopper, supra*, with *McLaughlin v. Tilendis*, 398 F. 2d 287 (7th Cir. 1968) and *Perry v. Sindermann, supra*, (5th Cir. 1970), *cert. granted*, 91 S. Ct. 2226 (1971). Similarly, the position of the Eighth Circuit in *Freeman v. Gould Special School District*, 405 F. 2d 1153, *cert. denied*, 396 U. S. 843 (1969), can be attributed to that Circuit's unwillingness to extend the substantive protections of due process to non-tenured teachers and thus involve the Federal Courts in what it considers to be the internal operations of school boards.

Since this Court has granted the petition for a writ of certiorari in *Perry v. Sindermann, supra*, it is likely that the split between the Fifth Circuit and the Tenth Circuit decision in *Jones v. Hopper, supra*, on the question of the substantive First Amendment rights of non-tenured teach-

ers will soon be resolved. However, respondent notes that the *Perry* case also raises questions as to the procedural rights of such non-tenured teachers. Nonetheless, respondent respectfully urges this Court to deny the petition for a writ of certiorari since the procedural issues raised by the Seventh Circuit decision in the present case can best be dealt with after the present conflict among the circuits on the underlying substantive questions is resolved.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVEN H. STEINGLASS
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Area Code 414/271-7772

ROBERT L. REYNOLDS, JR.
119 Monona Avenue
Madison, Wisconsin 53703
Area Code 608/257-4303
Attorneys for Respondent

CHARLES D. HOORNSTRA
MICHAEL W. SMITH
Of Counsel

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